Some Selected Interpretation and Qualification Issues with Respect to Article 15(2)(b) and (c) of the OECD Model

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Summary of Contents

Chapter 9

Some Selected Interpretation and Qualification Issues with Respect to Article 15(2)(b) and (c) of the OECD Model

*Frank P.G. Pötgens**

1. INTRODUCTION

This contribution elaborates on several interpretation and qualification issues of Article 15(2)(b) and (c) of the OECD Model. As is mentioned in Walter Adreoni's contribution, the 2010 Commentary on Article 15 of the OECD Model mainly intends to clarify the interpretation of the expression 'employer' in Article 15(2)(b) of the OECD Model. The amendments of the Commentary are a result of the Discussion Draft entitled *Revised Draft Changes to the Commentary on Paragraph 2 of Article 15* of 12 March 2007 which was implemented into the 2010 Commentary on Article 15 of the OECD Model (below: the '*2007 Discussion Draft*').[1]

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1. For an analysis of the 2007 Discussion Draft, see F.P.G. Pötgens, 'Proposed Changes of the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of "Employer" for Treaty Purposes', *Bulletin for International Taxation* (2007), No. 11, at 476 et seq.; M. Degrandi, 'The Meaning of the Term "Employer"', in D. Hohenwarter and V. Metzler (eds), *Taxation of Employment Income* (Vienna: Linde Verlag, 2009), at 98–103; A. Burján,

Dennis Weber & Stef van Weeghel (eds), *The 2010 OECD Updates: Model Tax Convention & Transfer Pricing Guidelines – A Critical Review*, pp. 125–143.

The author will compare and contrast the Commentary's view on the explanation of 'employer' with the distinction the Commentary elsewhere made between interpretation and qualification conflicts. Furthermore, this contribution addresses the explanation of the expressions 'paid by, or on behalf of' (Article 15(2)(b) of the OECD Model) and 'borne by' (Article 15(2)(c) of the OECD Model) on which the 2010 Commentary may shed some light.

2. PARAGRAPH 8 OF THE 1992–2008 COMMENTARY ON ARTICLE 15

The 2010 Commentary on Article 15 of the OECD Model seeks to respond, at least in part, to the criticism in the legal literature of paragraph 8 of the 1992–2008 Commentary on Article 15 of the OECD Model,[2] namely:

(a) The 1992–2008 Commentary seemed to proceed from the theory that there can be only one employer.
(b) The 1992–2008 Commentary appeared to suggest that the criteria for determining 'employer status' should be used only in cases of abuse (known as 'international hiring-out of labour'), but it was unclear what the precise meaning of abuse was and why a distinction was made between bona fide and abusive secondments.
(c) The structure of paragraph 8 of the 1992–2008 Commentary was unclear because it suggested that, for purposes of the OECD Model, the employer was the person who had the right to the work produced and who bore the responsibility and risks. This did not offer a complete definition of employer, even though the elements on which the competent authorities could mutually agree pursuant to paragraph 8 of the 1992–2008 Commentary reflected two important characteristics of an employment relationship, i.e. control and integration in the master's business.

'International Hiring-Out of Labour under Article 15 Paragraph 2 OECD MC', in D. Hohenwarter and V. Metzler (eds), *Taxation of Employment Income* (Vienna: Linde Verlag, 2009), at 140–145: A. Ballancin and J. Brockdorff, 'International Hiring-Out of Labour: Identifying and Taxing Genuine and Abusive Scenarios', in R. Russo and R. Fontana (eds), *A Decade of Case Law – Essays in honour of the 10th Anniversary of the Leiden Adv LLM in International Tax Law* (eds) (Amsterdam: IBFD, 2008), 80–83 and J.F. Avery Jones, 'Short-Term Employment Assignments under Article 15(2) of the OECD Model', *Bulletin for International Taxation* (2009), No. 1, at 6 et seq.

2. L. De Broe et al., 'Interpretation of Article 15(2)(b) of the OECD Model Convention: ''Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State''', *Bulletin for International Fiscal Documentation* 54 (2000), No 10, at 503 et seq. and F.P.G. Pötgens, *Income from International Private Employment* (Amsterdam: IBFD Publications, 2006), Doctoral Series No. 12, at 635 et seq.

3. SOME GENERAL FEATURES OF THE 2010 COMMENTARY ON ARTICLE 15 OF THE OECD MODEL

Contrary to paragraph 8 of the 1992–2008 Commentary on Article 15 of the OECD Model, the 2010 Commentary on Article 15 of the OECD Model clearly states that it not only addresses abusive structures but also bona fide cross-border employment relationships in dealing with the issue of 'employer' under the OECD Model.[3] The wording of the 2010 Commentary on Article 15 of the OECD Model is confusing, at least to some extent. The major part focuses on the employment relationship, but the subject the 2010 Commentary on Article 15 of the OECD Model in fact involves an analysis of when a person is to be regarded as the employer for purposes of Article 15(2) of the OECD Model. In the course of this analysis, the author assumes that the 2010 Commentary on Article 15 of the OECD Model indeed focuses mainly on the expression 'employer' for treaty purposes. This is based on the following factors and considerations:

(a) the place in the Commentary (the paragraphs of the 2010 Commentary on Article 15 of the OECD Model replaced paragraph 8 of the 1992–2008 Commentary on Article 15 of the OECD Model, which clearly concerned the determination of 'employer');
(b) the relevance and position of 'employment' (the 2010 Commentary on Article 15 of the OECD Model addresses Article 15(2) of the OECD Model in which 'employer' has an important position, whereas 'employment' is more relevant to Article 15(1) of the OECD Model[4]);
(c) the analysis made in the 2010 Commentary on Article 15 (the examples[5] and the objective criteria for determining who the 'employer' is for purposes of Article 15(2) of the OECD Model[6]); and
(d) the comments in the introduction to the *Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the OECD Model Tax Convention*1 of 5 April 2004 (below: 'the 2004 Discussion Draft'),[7] which were revised in its successor, the 2007 Discussion Draft, stating:

> It has been suggested that the exact scope of the paragraph [Article 15(2) of the OECD Model] is unclear when services are

3. Paragraph 8.1 of the 2010 Commentary on Art. 15 of the OECD Model.
4. This is partly recognized by the sentence that was added to para. 1 of the 2010 Commentary on Art. 15 of the OECD Model stating that the issue of whether services are provided in the exercise of an employment may sometimes give rise to difficulties, which are discussed in paras 8.1 et seq. of the 2010 Commentary on Art. 15 of the OECD Model.
5. The examples are in paras 8.16 to 8.27 of the 2010 Commentary on Art. 15. All the examples deal with the question of who the employer is for treaty purposes.
6. See para. 8.14 of the 2010 Commentary on Art. 15.
7. For a critical analysis of the 2004 Discussion Draft, see Pötgens, *supra* note 2, at 648–670; L. Wimetalov, 'Trends in Taxing Employees', in M. Stefaner M. and M. Züger (eds), *Tax Treaty Policy and Development* (Vienna: Linde Verlag, 2005), at 358–402 and E. Burgstaller, '"Employer" Issues in Article 15(2) of the OECD Model Convention – Proposals to Amend the OECD Commentary', *Intertax* (2005), No. 3 at 123 et seq.

> provided through intermediaries. Paragraph 8 of the Commentary on Article 15, which deals with so-called 'hiring-out of labour', addresses one aspect of that issue. *There are questions on the interpretation of the word 'employer' (found in subparagraphs 2 b) and c) of Article 15 of the Model Tax Convention), in particular as regards the domestic law definition of that term*. It has also been suggested that the application of paragraph 2 should be discussed in the context of the distinction between employment and self-employment, which is a common issue that tax authorities and taxpayers must confront. It has also been suggested that practical examples should be provided to illustrate the application of the paragraph in various common situations. (emphasis added)

This quote shows that the main focus of the 2004 Discussion Draft was on 'employer', where Article 15(2) should be explained against the background of the distinction between employment and self-employment; this conclusion is still accurate under the 2010 Commentary on Article 15 of the OECD Model.[8] Paragraph 1 of the 2010 Commentary on Article 15 was amended to include a reference to paragraphs 8 et seq. of the 2010 Commentary on Article 15 of the OECD Model for a discussion of the difficulties pertaining to the issue of whether services are provided in the exercise of an employment. It follows from this that the expressions 'employer' and 'employment' are interrelated, since they have many similarities. Therefore, the above comments on the rationale of the 2010 Commentary on Article 15 of the OECD Model are not intended to deny relevance to these extracts of the Commentary for the explanation of 'employment', but to emphasize the primary reasons for the 2010 Commentary on Article 15 of the OECD Model. Nevertheless, the author would have preferred that the Commentary included separate criteria for 'employment' and had taken a certain overlap for granted.[9]

The 2010 Commentary on Article 15 of the OECD Model reads 'an employer' as 'the employer'. As a result, the system of the 2010 Commentary on Article 15 of the OECD Model is first to define all possible employers and then to show how all these employers, except one, should be disregarded.

4. INTERPRETATION

4.1 Distinction between Formal and De Facto Employer

As is also remarked in Walter Adreoni's contribution to the 2010 Commentary on Article 15 of the OECD Model, the 2010 Commentary makes a distinction between states adopting a formal approach to 'employer' in their domestic tax law (and thus also in their tax treaties) and states taking the view that 'employer' should be given a substantive meaning.

8. See paras 8.1, 8.4 and 8.5 of the 2010 Commentary on Art. 15 of the OECD Model.
9. Compare Pötgens, *supra* note 2, at 298 et seq.

4.2 Formal Employer

Although its wording is not always entirely accurate, the 2010 Commentary on Article 15 of the OECD Model remarks that states using a formal approach to the expression 'employer' in Article 15(2) of the OECD Model may be concerned that the approach could result in granting the benefits of the exception in Article 15(2) in unintended situations, e.g. in cases of 'hiring-out of labour'.[10] It is indeed true that states following a formal explanation of 'employer' are most likely to encounter situations involving the international hiring-out of labour.[11] According to the 2007 Discussion Draft, these states (following a formal approach to 'employer') are free to bilaterally adopt a provision drafted along the lines of paragraph 8.3 of the 2010 Commentary on Article 15.[12] The 2010 Commentary on Article 15 of the OECD Model does not provide an explanation of 'international hiring-out of labour' and does not restrict the interpretation of 'employer' to abusive cases of hiring-out of labour.

4.3 De Facto Employer

According to the 2010 Commentary on Article 15 of the OECD Model, the domestic tax laws of states following a substantive interpretation (substance

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10. See paras 8.2 and 8.3 of the 2010 Commentary on Art. 15 of the OECD Model. The 2010 Commentary on Art. 15 of the OECD Model points out that some states consider that employment services are rendered only if there is a formal employment relationship. The author assumes that this remark addresses states using the formal concept of employer. This assumption is based on the place in the Commentary (replacing para. 8 of the 1992–2008 Commentary, which clearly deals with 'employer' for treaty purposes), the further analysis in the 2010 Commentary on Art. 15 of the OECD Model, and the fact that the paragraphs of the 2010 Commentary address Art. 15(2), i.e. its possible application where 'employer' is relevant, rather than 'employment', which is dealt with in Art. 15(1).
11. Germany uses a substantive explanation of 'employer' for treaty purposes. The reason for including a special provision combating the international hiring-out of labour is probably the fear that the German domestic concept of hiring-out of labour could affect Germany's tax treaties, which regard the hirer as the employer, or that the method of invoicing between the hirer and the user does not suffice to characterize the user as the economic employer; compare also the decisions of the German Federal Tax Court mentioned below. Under a tax treaty, see also the decisions of the German Federal Tax Court mentioned below.
12. The suggested provision reads as follows:

> Paragraph 2 of this Article shall not apply to remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State and paid by, or on behalf of, an employer who is not a resident of that other State if:
>
> a) the recipient renders services in the course of that employment to a person other than the employer and that person, directly or indirectly, supervises, directs or controls the manner in which those services are performed; and
> b) those services constitute an integral part of the business activities carried on by that person.

over form) may, even if a contract for services[13] is formally signed, ignore the way in which the services are characterized in the formal contract.[14] These states may, in the 2010 Commentary's view, prefer to focus primarily on the nature of the services rendered by the individual and their integration in the business of the enterprise that acquires the services in order to conclude that there is an employment relationship between the individual and that enterprise.[15] States following a substantive interpretation of 'employer' can do so based on the approach to interpretation discussed below.

A state could explain the concept of employment with the aid of its domestic law and conclude that the services should be characterized as employment services, but subject to the limitation that this approach should be applied based on the objective criteria in paragraphs 8.13 and 8.14 of the 2010 Commentary on Article 15 of the OECD Model and unless the context otherwise requires. As a result, the state would apply Article 15. According to the 2010 Commentary on Article 15 of the OECD Model, the state would therefore logically conclude that there is an employment relationship between the enterprise to which the services are rendered and the individual and that the enterprise is the employer for purposes of Article 15(2)(b). Pursuant to the 2010 Commentary on Article 15 of the OECD Model, this conclusion is consistent with the object and purpose of Article 15(2) since the employment services may be said to be rendered to a resident of the state where the services are provided.[16]

The meaning of 'employer' is determined by first interpreting 'employment'. After it is concluded that an employment relationship exists, the person to whom the services are rendered is automatically regarded as the employer, i.e. the employee performed his or her activities in an employment relationship (contract of services) with that enterprise rather than under a contract for the provision of services between two separate enterprises (contract for services).[17] The author assumes that this would disregard an affiliate resident in the work state as the employer of an individual who rendered some services on the affiliate's behalf if the individual has an employment relationship with a company resident in his or her residence state. To characterize the affiliate as the employer, an employment relationship must exist with the affiliate.

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13. In a contract *for* services, the services are considered to be rendered under a contract for the provision of services between two separate enterprises. A contract for services must be distinguished from a contract *of* services, where the services are rendered by an individual to an enterprise and are considered to be rendered in an employment relationship; see para. 8.4 of the 2010 Commentary on Art. 15.
14. See para. 8.6 of the 2010 Commentary on Art. 15 of the OECD Model.
15. Paragraph 8.6 of the 2010 Commentary on Art. 15 of the OECD Model.
16. See para. 8.7 of the 2010 Commentary on Art. 15 of the OECD Model. This view also seems to be defended by R. Prokisch, *Klaus Vogel on Double Taxation Conventions* (London, Boston and The Hague: Kluwer Law International, 1997), at 899.
17. Paragraph 8.7 of the 2010 Commentary on Art. 15 of the OECD Model.

4.4 Evaluation of Interpretation Method as Regards De Facto Employer

According to the 2010 Commentary, the aforementioned approach (explanation of employment by referring to the domestic law) should be applied on the basis of objective criteria.[18] Under this approach, a state cannot argue that, under its domestic law, services are deemed to constitute employment services where the relevant facts and circumstances make it clear that the services are rendered under a contract for services concluded between two separate enterprises, i.e. not an employment contract.[19] Article 15 would be rendered meaningless if states were allowed to deem services to constitute employment services in cases where there is clearly no employment relationship or to deny the status of employer to a non-resident enterprise that provides services through its own personnel to a resident enterprise (i.e. resident in the work state).[20] Conversely, if a state may properly regard the services of an individual as rendered in an employment relationship rather than under a contract for services concluded between two enterprises, that state should logically consider that the individual does not carry on the business of the enterprise that constitutes the individual's formal employer.[21]

One could criticize the method of interpretation followed by the 2010 Commentary on Article 15 of the OECD Model. It uses the domestic law meaning of 'employment' to interpret the expression 'employer'. If the author understands this approach correctly, it was chosen because the domestic law of a state may lack a definition of 'employer', but have a definition of 'employment'. The question arises as to whether this interpretation is to be regarded as an (indirect) reference to the domestic law of the state applying the tax treaty or as an autonomous interpretation of 'employer'. The author assumes that the latter is the case because the 2010 Commentary on Article 15 of the OECD Model concludes that an employer is an enterprise to which the individual renders his or her services in an employment relationship, which conclusion is drawn independently of the domestic laws of the contracting states. Unfortunately, the 2010 Commentary on Article 15 of the OECD Model is not entirely clear on this point. It does not indicate how this method of interpretation should be considered, nor does it explain this method of interpretation further. In the author's view, it would have been preferable for the 2010 Commentary on Article 15 of the OECD Model to refer

18. Paragraph 8.11, *ibid*.
19. *Ibid*.
20. *Ibid*.
21. See para. 8.11 of the 2010 Commentary on Art. 15 of the OECD Model. According to para. 8.11 of the 2010 Commentary on Art. 15 of the OECD Model, this could be relevant, for example, in determining whether the enterprise has a PE at the place where an individual performs his activities. See also para. 4.3 of the 2003–2010 Commentary on Art. 5 of the OECD Model, regarding when an employee who is assigned by a parent company to render services on behalf of a subsidiary in another state can constitute a PE of his employer because he is allowed to use an office at the subsidiary's headquarters for a long period of time and the activities do not qualify under Art. 5(4) of the OECD Model (ancillary or preparatory activities).

to the general rules of interpretation in the Vienna Convention on the Law of Treaties of 23 May 1969 ('*Vienna Convention*')[22] which are to be used to interpret the expression 'employer' and to be silent on the method of interpretation. This is also demonstrated by the case law of the German Federal Tax Court[23] and the Dutch Supreme Court.[24] The domestic laws of these states do not have a definition of 'employer' (in *BNB* 2004/138, for instance, the Dutch Supreme Court did not directly point to the definition in Dutch civil law), but do have a definition of 'employment'. Nevertheless, the courts of these states attempted to interpret 'employer' autonomously, and the Dutch Supreme Court strongly relied on the authority element, which is also relevant when explaining 'employment'.[25]

The 2010 Commentary on Article 15 of the OECD Model also neglects the situation where states have a definition of 'employer' in their domestic law which is not limited to the withholding tax concepts (e.g. the United States and the United Kingdom). In these cases, Article 3(2) of the OECD Model is to be applied to interpret 'employer'.[26] As a result, reference is made to the domestic law definition that is deemed to be decisive under the relevant tax treaty, unless the context requires another meaning.[27]

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22. The Vienna Convention entered into force on 27 Jan. 1980 after the ratification and accession by the 35th state, i.e. Togo, which deposited the instruments of accession on 28 Dec. 1979.
23. See the decisions of the German Federal Tax Court of 21 Aug. 1985, *BStBl.* II 1986, at 4; 29 Jan. 1986, *BStBl.* 1986, at 442; 29 Jan. 1986, *BStBl.* II 1986, at 513; 27 Apr. 2000, *IStR* 2000, at 569; 5 Sep. 2001, *IStR* 2002, at 164; 15 Mar. 2000, *IStR* 2000, at 408; and 25 Feb. 2005, *BB* 2005, No. 27 at 1482.
24. See the decisions of the Dutch Supreme Court of 1 Dec. 2006, *BNB* 2007/75-79 (discussed by F.P.G. Pötgens, 'The Dutch Supreme Court Reaffirms and Clarifies ''de facto employer'' under Article 15 of the OECD Model' *Intertax* (2008), No. 2 at 75–81); 28 Feb. 2003, *BNB* 2004/138; and 12 Oct. 2001, *BNB* 2002/65.
25. The German Federal Tax Court also adopted a comparable approach under German domestic tax law to interpret 'employer', i.e. the inverse of the meaning given to 'employee'. Unlike 'employer', the German wage tax regulations have a definition of 'employee'. Furthermore, the outcome of this interpretation does not apply to situations involving the triangular hiring-out of labour under German domestic law, nor is it relevant to interpreting 'employer' for treaty purposes; see the decision of the German Federal Tax Court of 29 Mar. 1999, *IStR*. 2000, No. 3 at 83.
26. In H. Loukota & W. Loukota, 'Kurzfristige internationale Arbeitskräfteentsendungen', *SWI* (2006), No. 3 at 110–118, the authors criticized the 2004 Discussion Draft because it could lead to the user being found to be the employer in cases where this would not happen according to the domestic law of the state applying the tax treaty, which domestic law meaning could also be relevant pursuant to Art. 3(2). The authors questioned whether the domestic law meaning can be overruled by the explanation given in the 2004 Discussion Draft. Moreover, they think that the EU Member States, when following the explanation given in the 2004 Discussion Draft, could violate the non-discrimination principle of the Treaty on the Functioning of the European Union (Art. 18 in conjunction with Arts 45 et seq.). This could happen if an EU Member State applies an interpretation to a cross-border case (the user is the employer) that differs from a domestic situation (the hirer is the employer). In this respect, the authors also referred to the case law of the European Court of Justice, such as Case C-234/00, *Lankhorst-Hohorst* (12 Dec. 2002).
27. Similar considerations pertain to Belgium. Belgian civil law explicitly provides that an agency, i.e. the person with whom the worker has concluded a formal employment contract, must be regarded as the employer. The combination of an explicit legal provision (considering the

Considering these observations, the author would have preferred that the 2010 Commentary on Article 15 of the OECD Model did not include the paragraphs elaborating the possible approach explaining 'employer' because it is questionable whether they reflect the proper interpretation of that term. The same applies to paragraph 8.3 of the 2010 Commentary on Article 15 of the OECD Model (quoted in 4.2), which includes a suggested text for states following a formal interpretation of 'employer' in order to counter abuse. In the author's view, it would have been preferable to include a set of criteria in the Commentary or in a treaty provision that would be valid for all situations irrespective of whether states follow a formal or substantive interpretation of 'employer' under their domestic law.[28]

5. INTERPRETATION CONFLICTS AND QUALIFICATION CONFLICTS

5.1 General

The rationale of the 2010 Commentary on Article 15 of the OECD Model in which the explanation of 'employer' plays a prominent part is that paragraph 8 of the 1992–2008 Commentary on Article 15 of the OECD Model could lead to obscurities (see also 2) and that the 2000–2010 Commentary on Article 23 of the OECD Model only resolves qualification conflicts; it does not resolve interpretation conflicts (the mutual agreement procedure is the last resort), where practical difficulties continue to exist. The 2000–2010 Commentary on Article 23 provides a solution only if these divergent views are a result of differences in the domestic laws of the work state and the residence state. This presupposes that the domestic laws of these states include a definition of 'employer' to which Article 3(2) refers.

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agency to be the employer) and the case law of the Belgian Courts of Appeal (also favouring a formal interpretation of 'employer' under Belgium's tax treaties) could support the finding that the agency is the employer from that perspective; see the decisions of the Mons Court of Appeal, 8 Mar. 1984, *F.J.F.* 85/3; Brussels Court of Appeal, 2 May 2001, *F.J.F.* 2001/214; Brussels Court of Appeal, 7 Oct. 1993, *A.F.T.* 1994, at 95; and Ghent Court of Appeal, 7 Oct. 1999, *F.J.F.* 2000/97. This explanation would prevail over the unilateral explanation given by the Belgian tax authorities, who, in their Circular of 25 May 2005, No. AFZ 2005/0652 (AFZ 08/2005), took the view that a substantive explanation of 'employer' must be followed regarding all types of cross-border assignments. In the same sense, see Pötgens, *supra* note 2, at 622–624; K. Billen., 'Uitzendbureaus: materieel werkgeversbegrip in Nederland', *Fiscoloog Internationaal*, 2004, No. 245 at 5; L. De Broe 'Kroniek Internationaal Belastingrecht 2003–2004', *Tijdschrift voor Rechtspersoon en Vennootschap*, 2004, at 662; P. Vanhaute, 'Artikel 15 – Inkomsten uit niet-zelfstandige beroepen', in B Peeters (ed.), *Het Belgisch-Nederlands dubbelbelastingverdrag* (Larcier: Ghent, 2008) at 433 and 434; A. Cools, 'Het werkgeversbegrip bij internationale uitzendarbeid met focus op het nieuwe dubbelbelastingverdrag tussen België en Nederland', *Tijdschrift voor fiscaal recht* (2007), No. 322 at 401–404 and B. Peeters, 'Artikel 15 OESO-modelverdrag: 'inkomsten uit niet-zelfstandige arbeid'. De nieuwe administratie circulaire d.d. 25 mei 2005 en de niet-gedefinieerde begrippen', *Tijdschrift voor rechtspersoon en vennootschap* (2006), No. 3, at 233 and 234.

28. Pötgens, *supra* note 2, at 670 and 671.

If the domestic laws of these states do not contain a definition of 'employer' (including situations where only 'wage tax withholding agent' is defined), divergent opinions on the interpretation of 'employer' are not to be regarded as 'qualification conflicts' within the meaning of paragraph 32.3 of the 2000–2010 Commentary on Article 23, but rather as 'interpretation conflicts' within the meaning of paragraph 32.5 of the 2000–2010 Commentary on Article 23. The author assumes that such an interpretation conflict is also present if one state has a definition of 'employer' in its domestic law, which is affected by the tax treaty, whereas the other state interprets that expression autonomously.[29] Paragraph 32.3 of the 2000–2010 Commentary on Article 23 points to differences in the domestic laws of the residence state *and* the source state.

In order to resolve qualification conflicts, the founders of the theory on the Commentary on the OECD Model ('*International Tax Group*') take as a point of departure that the residence state should not interpret the expression 'employer' independently, but should address the question under Article 23 of the OECD Model as to whether the work state has taxed the remuneration 'in accordance with the provisions of the Convention'. This question does not involve the characterization of income or, as in this case, who is an employer. When considering relief from the work state's tax, the residence state's only argument for denying relief is that such taxation was not 'in accordance with the provisions of the Convention'. This implies that the work state has misinterpreted or misapplied the provisions of its domestic law or the treaty.[30]

This would, in any event, mean that conflicts would also be resolved when the residence state interprets 'employer' autonomously and the work state explains 'employer' with the aid of its domestic law as a consequence of Article 3(2). In this case, the residence state would in principle have to follow the work state's characterization of who is to be regarded as the employer. Another possibility is that the work state interprets 'employer' autonomously because its domestic law lacks a definition; i.e., Article 3(2) does not apply. The author assumes that, under this theory, the residence state will still not apply Article 3(2) or otherwise interpret 'employer' autonomously, but will instead consider whether it should grant relief from the work state's tax pursuant to Article 23 of the OECD Model. Here, the relevant question is whether that taxation is 'in accordance with the provisions of the Convention'.[31] It could be argued that the residence state has a slightly different position when answering this question in this situation since applying Article 3(2) could demand the residence state to question the work state's application of its domestic law meaning of 'employer', which seems to be a difficult position for the residence state.[32]

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29. See the decisions of the Dutch Supreme Court of 1 Dec. 2006, *BNB* 2007/5-79 (discussed by Pötgens, *supra* note 23, at 75–81); 28 Feb. 2003, *BNB* 2004/138; and 12 Oct. 2001, *BNB* 2002/65. See also the decision of the German Federal Tax Court of 21 Aug. 1985, *BStBl.* II 1986, at 4.
30. De Broe et al., *supra* note 2, at 519.
31. *Ibid.*, at 519.
32. In *ibid.,* at 519 and 520, the authors not only applied this approach under Art. 3(2) of the OECD Model, but also embodied the approach in Arts 31 and 32 of the Vienna Convention.

This approach would resolve all types of characterization conflicts, i.e. also what the Commentary regards as interpretation conflicts, which would be in accordance with the object and purposes of the tax treaty, namely, to avoid double taxation and double non-taxation,[33] and the principle of good faith.[34] Therefore, the author endorses this analysis.[35]

5.2 The 2010 Commentary on Article 15 of the OECD Model as Regards Qualification and Interpretation Conflicts

As mentioned above, the interpretation of 'employer' in Article 15(2)(b) followed in the 2010 Commentary on Article 15 of the OECD Model is striking (see 4.4). The 2010 Commentary notes that this expression, at least if the contracting states interpret 'employer' substantively, is to be interpreted by determining to which person the employment services are rendered ('the concept of employment to which Article 15 refers is to be determined according to the domestic law of the State that applies the convention . . . subject to the limit described in paragraph 8.11[36] and unless the context of a particular convention requires otherwise').[37] The 2007 Discussion Draft and the 2010 Commentary on Article 15 of the OECD Model attempt to overcome the criticism made of the 2004 Discussion Draft, i.e. that it did not directly address paragraphs 32.1 to 32.7 of the 2000–2010 Commentary on Article 23 of the OECD Model.[38] Paragraph 8.10 of the 2010 Commentary on Article 15 of the OECD Model refers to these paragraphs. In addition, paragraph 8.4 of the 2010 Commentary on Article 15 of the OECD Model also seems to allude to the solution for qualification conflicts (paragraph 32.3 of the 2000–2010 Commentary on Article 23 of the OECD Model) by stating that – subject to the limit described in paragraph 8.11 of the 2010 Commentary on Article 15 of the OECD Model and unless the context of a particular treaty requires otherwise – it is a matter of the domestic law of the source state to determine whether services rendered by an individual in that state are provided in an employment relationship. That determination will govern how the source state applies the

33. Since January 2003, para. 7 of the Introduction to the OECD Model has explicitly stated that it is also a purpose of tax treaties to prevent tax avoidance and tax evasion; see B.J. Arnold, 'Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model', *Bulletin for International Fiscal Documentation* (2004), No. 6, at 244.
34. F.A. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), Doctoral Series No. 7, at 505.
35. Compare also F.P.G. Pötgens and L.J. de Heer, 'Het internationaal publiekrechtelijke effectiviteitbeginsel en kwalificatieconflicten', *Weekblad fiscaal recht* (2010), No. 6870, at 1028.
36. Paragraph 8.11 of the 2010 Commentary on Art. 15 of the OECD Model provides that the conclusion that under the domestic law, a formal contractual relationship should be disregarded must be arrived at on the basis of objective criteria.
37. It can be assumed that the 2010 Commentary on Art. 15 of the OECD Model here alludes to the application of Art. 3(2) of the OECD Model.
38. Pötgens, *supra* note 2, at 664 and 665.

treaty. In other words, within certain limits the source state determines how the expression 'employer' is interpreted and explained.[39]

Paragraph 8.10 of the 2010 Commentary on Article 15 of the OECD Model indicates that the residence state – subject to certain circumstances, i.e. abusive cases or if the work state under its domestic law adopts a formal interpretation of the expression 'employment' – must follow the work state's qualification including that the services are rendered in an employment relationship to a local enterprise that is a resident of the work state. Consequently, the authority to tax the employee's salary relating to the services rendered in the work state is assigned to the work state. Accordingly, the residence state must grant relief for double taxation pursuant to Article 23 of the OECD Model and under reference to paragraphs 32.1–32.7 of the 2000–2010 Commentary on that provision.

Apparently, paragraph 8.10 intends, according to the approach adopted by De Broe et al., to reach the situation where the residence state is obliged to follow the work state's characterization in cases that go beyond what paragraphs 32.3 and 32.5 of the Commentary on Article 23 would regard as qualification conflicts. According to paragraph 8.10 of the 2010 Commentary on Article 15 of the OECD Model, the solution in paragraphs 32.1 to 32.7 of the 2000–2010 Commentary on Article 23 of the OECD Model also applies if one of the contracting states does not apply Article 3(2) of the OECD Model, for instance, because it followed an autonomous interpretation of 'employer'.[40] This seems to be inconsistent because paragraph 8.10 of the 2010 Commentary on Article 15 of the OECD Model implies that the solution for qualification conflicts, i.e. the residence state follows the source state's qualification, is applied to an interpretation conflict, i.e. a situation where none or only one of both contracting states drew on Article 3(2) of the OECD Model to interpret 'employer'. According to the Commentary on Article 23 of the OECD Model such an interpretation conflict must be solved through the mutual agreement procedure (Article 25 of the OECD Model).

Although one can appreciate the attempt of the 2010 Commentary on Article 15 of the OECD Model to follow the aforementioned broader view, the issue remains that paragraph 8.10 of the 2010 contradicts paragraphs 32.1 to 32.7 of the 2000–2010 Commentary on Article 23 – in particular, paragraph 32.3 (definition of qualification conflicts which refers to differences in the domestic law) and paragraph 32.5 (description of interpretation conflicts, including different

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39. Compare also G.T.W. Jansen, 'Kwalificatieverschillen en de rol van de bronstaat in de toepassing van belastingverdragen', in K. Braun, T. van Kempen, T. de Kroon, K. van Raad, A. Rijkers, K. van der Spek, S. Strik and G. van Westen (eds), *40 jaar Cursus Belastingrecht* (Kluwer, Deventer, 2010), at 85.
40. As is indicated above, the Dutch Supreme Court and the German Federal Tax Court adopt this type of approach. See the decisions of the Dutch Supreme Court of 1 Dec. 2006, *BNB* 2007/5-79 (discussed by Pötgens, *supra* note 23, at 75–81) and the decision of the German Federal Tax Court of 21 Aug. 1985, *BStBl.* II 1986, at 4. Both the Dutch Supreme Court and the German Federal Tax Court interpreted 'employer' autonomously in which connection a definition of 'employer' was lacking in the relevant domestic laws and despite the fact that these domestic laws contained a definition of 'employment'.

interpretation of the provisions of the OECD Model but not of the different provisions of the domestic law). The authority of the Commentary is undermined when it contains such contradictions. If the Commentary intends to express the aforementioned broader view, it should similarly amend paragraphs 32.1 to 32.7 of the 2000–2010 Commentary on Article 23. Otherwise, inconsistencies, obscurities and difficulties will continue to exist.

6. 'PAID BY, OR ON BEHALF OF' (ARTICLE 15(2)(B) OF THE OECD MODEL)

6.1 General

There is a clear relationship between the expression 'paid by, or on behalf of' in Article 15(2)(b) and 'borne by' in Article 15(2)(c) of the OECD Model. The 2000–2005 Commentary on the OECD Model[41] and the case law of the German Federal Tax Court[42] confirm that Article 15(2)(b) and (c) serves a common purpose. Furthermore, Article 15(2)(b) and (c) forms part of the same paragraph in the same article and therefore have the same context.[43]

According to the author the expression 'paid by, or on behalf of' should generally be interpreted autonomously.[44] As a result, Article 3(2) of the OECD Model would generally not play a part in the interpretation of 'paid by, or on behalf of' because the domestic law does not contain similar or equivalent expressions, which is often the case for 'paid by, or on behalf of'. In addition, if such terms are used in the domestic law of the states applying the relevant tax treaty, they are frequently not used in the same context as is the case in Article 15(2)(b) of the OECD Model.[45]

6.2 2010 Commentary on Article 15 of the OECD Model

The 2010 Commentary on Article 15 of the OECD Model devotes, at least implicitly and contrary to its previous versions, attention to the meaning of the phrase 'paid by, or on behalf of' in Article 15(2)(b). The 2010 Commentary accepts that 'paid by' and 'paid on behalf of' cover two separate situations (and respects the

41. Paragraph 6.2 of the 2000–2010 Commentary on Art. 15 of the OECD Model.
42. Decision of the German Federal Tax Court of 21 Aug. 1985, *BStBl.* II 1986, at 4.
43. De Broe et al., *supra* note 2, at 511 and the Technical Explanation of the 2006 US Model Income Tax Convention, at 49.
44. Pötgens, *supra* note 2, at 697 and 698.
45. Compare the decisions of the Dutch Supreme Court, 21 Feb. 2003, *BNB* 2003/177 and 178. This picture was confirmed by the case law examined in Pötgens, *supra* note 2, at 709 et seq. that did not take recourse to domestic law meanings either. Instead, the various decisions endeavoured to establish autonomously whether the salary is paid either by an employer resident in the work state or on behalf of such an employer.

ordinary meaning of 'or', i.e. 'or' should not be read as 'and'), and the focus is therefore on the employer resident in the work state who bears the salary costs relating to the services rendered by the employee in that state. This explanation may be deduced from Example 5 (paragraphs 8.24 and 8.25 of the 2010 Commentary on Article 15 of the OECD Model):

> ICo is a company resident of State I specialised in providing engineering services. ICo employs a number of engineers on a full-time basis. JCo, a smaller engineering firm resident in State J, needs the temporary services of an engineer to complete a contract on a construction site in State J. ICo agrees with JCo that one of ICo's engineers, who is a resident of State I momentarily not assigned to any contract concluded by ICo, will work for 4 months on JCo's contract under the direct supervision and control of one of JCo's senior engineers. JCo will pay ICo an amount equal to the remuneration, social contributions, travel expenses and other employment benefits of that engineer for the relevant period, together with a 5% commission. JCo also agrees to indemnify ICo for any potential claims related to the engineer's work during that period of time.

In that case, even if ICo is in the business of providing engineering services, it is clear that the work performed by the engineer on the construction site in State J is performed on behalf of JCo rather than ICo. The direct supervision and control exercised by JCo over the work of the engineer, the fact that JCo takes over the responsibility for that work and that it bears the cost of the remuneration of the engineer for the relevant period are factors that could support the conclusion that the engineer is in an employment relationship with JCo. Under the approach described above, State J could therefore consider that the exception of paragraph 2 of Article 15 would not apply with respect to the remuneration for the services of the engineer that will be rendered in that State.

In Example 5, ICo, the seconding company, continues to pay the engineer's salary, while JCo, the receiving company, is charged specifically for the engineer's remuneration, social security contributions, travel expenses and other employment benefits for the relevant period, together with a 5% commission. The 2010 Commentary on Article 15 of the OECD Model concludes that the condition of Article 15(2)(b) of the State I–State J tax treaty is not met. In so doing, the 2010 Commentary on Article 15 of the OECD Model seems to distinguish between different situations covered by the phrases 'paid by' and 'paid on behalf of', which is shown by the following facts: (a) ICo pays the salary without bearing the costs, and (b) ICo recharges the costs to JCo with the consequence that JCo ultimately bears the costs. Hence, ICo paid the salary on behalf of JCo, which is an employer of the engineer residing in the work state. JCo ultimately assumed the analogous salary costs.

The 2010 Commentary on Article 15 of the OECD Model mentions, as one of the alternative factors in determining who the employer is within the meaning of Article 15(2)(b), that 'the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided'. In the

author's opinion, this factor is more relevant to explaining the phrase *paid by, or on behalf of* than the term *employer*. From this perspective, it is striking that paragraph 8.14 of the 2010 Commentary regards the direct charge of the employee's remuneration as one of the objective criteria for determining 'employer', but the 2010 Commentary remains silent on the explanation of 'paid by, or on behalf of'. Taking these considerations into account, the fact that paragraph 8.14 of the 2010 Commentary on Article 15 of the OECD Model refers to a direct charge of the remuneration may also shed light on how 'paid by, or on behalf of' should be explained. Paragraph 8.15 of the 2010 Commentary on Article 15 states that an indication of such a direct charge is, for instance, that the fees represent the individual's remuneration, employment benefits and other employment costs for the services he or she provided to the enterprise to which he or she was seconded by his or her formal employer with no profit element or with a profit element that is computed as a percentage of that remuneration, benefits and other employment costs. This is not the case if, for example, the fees charged for the services bear no relation to the individual's remuneration or if the remuneration is only one of many factors taken into account in the fees charged for what is really a contract for services (e.g. where a consulting firm charges a client on the basis of an hourly fee for the time spent by one of its employees to perform a particular contract and the fee encompasses the various costs of the enterprise), provided this is in conformity with the arm's length principle if the two enterprises are associated.[46]

Although the author welcomes the step taken in the 2010 Commentary on Article 15 of the OECD Model to clarify implicitly the meaning of 'paid by, or on behalf of', it would have been preferable to include a paragraph in the Commentary setting out the above interpretation. From this perspective, it is incomprehensible that the 2010 Commentary devotes so much attention to the phrase *borne by* in Article 15(2)(c) of the OECD Model (see also below) but does not explain the phrase *paid by, or on behalf of* clearly and explicitly. Nor does the explanation of the phrase *made by or on behalf of* in paragraph 49 of the 2005–2010 Commentary on Article 18 of the OECD Model suffice.[47]

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46. Some authors regarded Examples 3 and 4 in the 2007 Discussion Draft (similar to Examples 3 and 4 of the 2010 Commentary on Art. 15 of the OECD Model that are included in paras 8.20 through 8.23), which were also laid down in the 2004 Discussion Draft, as an implicit statement that the phrase 'paid by, or on behalf of' does not require a specific and explicit recharge; see J. Baeten, 'Mobilité internationale: nouveau commentaire belge de l'article 15 des conventions préventive de la double imposition', *RGF* (2005), No. 11 at 9.
47. This paragraph includes an analysis of the expression 'made by or on behalf of' which is used in two alternative provisions suggested by the 2005–2010 Commentary on Art. 18 of the OECD Model in order to overcome difficulties when contributions are paid to foreign pension funds (compare paras 37 and 38 of the Commentary on Art. 18 of the OECD Model respectively). According to the Commentary, the phrase 'made by or on behalf of' is intended to apply to contributions made directly by the individual as well as to those that are made for that individual's benefit by an employer or another party. Contributions made for the individual means that the contribution is borne by the employer or another party and paid on behalf of the employee. In the same sense W. Andreoni, 'Cross-Border Tax Issues of Pensions', *Intertax* (2006), No. 5, at 253.

7. 'BORNE BY' (ARTICLE 15(2)(C) OF THE OECD MODEL)

7.1 General

According to the author, the concept *borne by* must be interpreted autonomously and thus not by using Article 3(2) of the OECD Model.[48] Two arguments can be advanced to support this. On the one hand, the concept *borne by* involved the allocation of the salary costs to the PE and this is largely a factual matter (Article 3(2) of the OECD Model assumes that the concept being interpreted has a legal connotation).[49] On the other hand, Article 7 of the OECD Model already provides a definition of the expression *borne by*.[50] In their decisions to date, the Dutch Supreme Court[51] and the German Federal Tax Court,[52] for instance, have also used this kind of autonomous interpretation.

7.2 The Meaning of *Borne by* according to the Commentary on Article 15(2)(c) of the OECD Model

Following the changes made in 2000, the Commentary on Article 15 of the OECD Model[53] takes the view that the attribution under Article 7 is decisive for the interpretation of the concept *borne by*. The Commentary places such an attribution against the background of the object and purpose of Article 15(2)(c) of the OECD Model. This object and purpose is such that if the deduction of remuneration is allowed under Article 7 of the OECD Model when calculating the profits of the PE in the work state, it receives the taxing rights on this remuneration as compensation for this deduction.[54] The Commentary does not, however, require that the remuneration in the PE state actually be deducted from the profits. After all, such a deduction is not decisive under the rules of Article 7 of the OECD Model either.[55]

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48. Pötgens, *supra* note 2, at 672 referring to the fact that the case law of tax courts in various states that was examined, similarly interpreted 'borne by' without mentioning Art. 3(2), i.e. no recourse was made to the domestic law of the states applying the relevant tax treaty. The majority of the decisions researched pointed to Art. 7 in explaining 'borne by'.
49. See also the decision of the Dutch Supreme Court of 29 Sep. 1999, *BNB* 2000/16 and 17 regarding the interpretation of the term 'temporary' (*tijdelijk*) in Art. 10(2)(1) of the 1959 Germany – Netherlands tax treaty.
50. Pötgens, *supra* note 2, at 672.
51. See the decisions of the Dutch Supreme Court of 9 Dec. 1998, *BNB* 1999/267; 12 Oct. 2001, *BNB* 2002/125 and of 23 Nov. 2007, *BNB* 2008/29. See for a discussion of these decisions, F.P.G. Pötgens, 'The Netherlands Supreme Court and Remuneration Borne by a Permanent Establishment – Third Time Lucky!', *European Taxation*, 2008, No. 12, at 654 et seq.
52. See the decision of the German Federal Tax Court of 24 Feb. 1988, *BStBl.* II 1988, at 819.
53. Paragraph 7 of the 2000–2010 Commentary on Art. 15 of the OECD Model.
54. Paragraph 6.2, *ibid.*
55. Paragraph 7, *ibid.*

According to the Commentary on Article 15 of the OECD Model, what is important is that the costs are deductible as such and for tax purposes, having regard to Article 7. Again according to the Commentary, this may also be said to be the case if the PE is exempt from taxation in the state of activity if the employer chooses not to take a deduction to which it would normally be entitled or because the remuneration is not deductible because of its nature, as might be the case, for example, with regard to employee stock options.[56]

As a result of the 2010 amendments to the Commentary, a new paragraph was added to the Commentary on Article 15 of the OECD Model (paragraph 7.2) which reads as follows:

> 7.2 For the purpose of determining the profits attributable to a permanent establishment pursuant to paragraph 2 of Article 7, the remuneration paid to an employee of an enterprise of a Contracting State for employment services rendered in the other State for the benefit of a permanent establishment of the enterprise situated in that other State may, given the circumstances, either give rise to a direct deduction or give rise to the deduction of a notional charge, e.g. for services rendered to the permanent establishment by another part of the enterprise. In the latter case, since the notional charge required by the legal fiction of the separate and independent enterprise that is applicable under paragraph 2 of Article 7 is merely a mechanism provided for by that paragraph for the sole purpose of determining the profits attributable to the permanent establishment, this fiction does not affect the determination of whether or not the remuneration is borne by the permanent establishment.

Some authors derive, among other things, from this amendment that it is decisive for the expression *borne by* that (i) the salary costs are attributable to the permanent establishment on an at arm's length basis pursuant to the newly drafted Article 7 of the OECD Model (2010 version)[57] and (ii) the salary costs are actually recharged to

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56. Paragraph 7.1, *ibid*. This paragraph was slightly amended in 2010:

> The fact that the employer has, or has not, actually claimed a deduction for the remuneration in computing the profits attributable to the permanent establishment is not necessarily conclusive since the proper test is whether any deduction otherwise available with respect to that remuneration should be taken into account in determining the profits attributable to the permanent establishment. That test would be met, for instance, even if no amount were actually deducted as a result of the permanent establishment being exempt from tax in the source country or of the employer simply deciding not to claim a deduction to which he was entitled. The test would also be met where the remuneration is not deductible merely because of its nature (e.g. where the State takes the view that the issuing of shares pursuant to an employee stock-option does not give rise to a deduction) rather than because it should not be allocated to the permanent establishment.

57. The 2010 Commentary on Art. 7 of the OECD Model in an annex contains the text of Art. 7 and its Commentary as it read before 22 Jul. 2010. That previous version of Art. 7 and Commentary is provided because they will, according to the Commentary, continue to be relevant for the application and interpretation of bilateral tax conventions that use the previous wording of the Art. 7.

the permanent establishment.[58] However, one could question this view. The author believes that both under the 2008 and 2010 version of Article 7 of the OECD Model, it is relevant and decisive whether the salary costs are attributable to the permanent establishment on an at arm's length basis by virtue of Article 7 of the OECD Model, i.e. the criterion was and continues to be whether the work has been carried out for purposes of the permanent establishment. According to the Authorized OECD Approach, a dealing has to be identified between the head office and the permanent establishment entailing that the salary costs have to be allocated to the permanent establishment.[59] This view is in line with the decisions of the Dutch Supreme Court,[60] the decisions of the German Federal Tax Court[61] and the view of the Belgian[62] and US tax authorities.[63] The UK tax authorities, however, seem to require an actual recharge of the salary costs to the permanent establishment which recharge must be in line with Article 7 of the OECD Model.[64]

8. CONCLUSION

According to the author, the distinction between states applying a formal interpretation of employer and states applying a substantive interpretation for treaty purposes should be abolished. For states using a formal interpretation, the objective criteria should also result in the formal employer not being regarded as the employer for treaty purposes. In the author's view, there should be a uniform approach in this respect, preferably laid down in a tax treaty provision or, as a last resort, in the Commentary on the OECD Model.

The 2010 Commentary uses a particular interpretation method as regards states following a substantive interpretation of employer. According to this approach the employer is the person to whom the employee renders his or her services in an employment relationship ('employment' is interpreted by reference to the domestic laws of the states applying the treaty). It would seem preferable to delete the paragraphs describing the substantive interpretation of employer from the Commentary because of the intrinsic inconsistencies. Little substantiation has been provided for this approach in interpreting 'employer'. Nor was any reference made to states applying Article 3(2) of the OECD Model when interpreting

58. See P. Kavelaars, 'OESO 2010 en het werknemersartikel', *NTFR Beschouwingen* 2010/40, at 30 and 31.
59. See paras 28 and 31 of the 2010 Commentary on Art. 15 of the OECD Model. See also L. Nouel, 'The New Article 7 of the OECD Model Tax Convention: The End of the Road?', *Bulletin for International Taxation* (2011), No. 1, at 10 and 11.
60. See the decisions of the Dutch Supreme Court of 9 Dec. 1998, *BNB* 1999/267; 12 Oct. 2001, *BNB* 2002/125 and of 23 Nov. 2007, *BNB* 2008/29.
61. The decision of the German Federal Tax Court of 24 Feb. 1988, *BStBl.* II 1988, at 819.
62. Circular of 25 May 2005, No AFZ 2005/0652 (AFZ 08/2005).
63. The Technical Explanation of the 2006 US Model Income Tax Convention, at 49.
64. Pötgens, *supra* note 2, at 690 and Double Taxation Relief Manual, para. DT1923 (www.hmrc.gov.uk/manuals/DTmanual/dt1923.htm).

'employer'. By contrast, the solution for the qualification conflicts that may result from Article 3(2) – i.e. paragraph 8.10 of the 2010 Commentary refers to paragraphs 32.1 to 32.7 of the 2000–2010 Commentary on Article 23 of the OECD Model to resolve conflicts when a formal interpretation is followed or in abusive cases – does not seem to be consistent with the definition of interpretation and qualification conflicts in paragraphs 32.1 to 32.7 of the 2000–2010 Commentary on Article 23 of the OECD Model. Hence, in the author's view, it would have been preferable to only include a description of 'employer' in the Commentary or in a treaty provision (or alternatively in the OECD Model) which would remove the distinction between a formal and substantive interpretation of 'employer'.